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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. _____

LEON WHITE, et al., Petitioners,

v.

C. VAUGHN ROUGHTON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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February 7, 1983

QUESTIONS PRESENTED

1. Whether, in an action for enforcement of a consent decree, it is permissible for a court to resort to extrinsic aids and disregard the literal terms of the consent decree when the language of the decree is not ambiguous.

2. Whether a party to a Consent Decree can unilaterally repeal a provision incorporated into the Consent Decree.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioners, Leon White, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in

this proceeding on September 9, 1982.[1]

OPINION BELOW

The opinion of the Court of Appeals is reported at 689 F.2d 118-121, and appears in the Appendix hereto. The opinion of the District Court for the Central District of Illinois was not reported.

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[1] The Petitioners are Leon White, Elester Walker and Beatrice Silagy, individually and on behalf of the certified classes of all others similarly situated which they represent.

The respondents are 1) William Rice, successor to C. Vaughn Roughton, Township Supervisor of the City of Champaign Township, Champaign, Illinois, and 2) City of Champaign Township.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 9, 1982. A timely petition for rehearing en banc was denied on November 9, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

There are no constitutional provisions, treaties, statutes, ordinances or regulations involved in this action. This action is based on contract law and on the case law concerning judicial enforcement of consent decrees.

STATEMENT OF THE CASE

A. History of the Case

The petitioners are two certified classes consisting of all applicants for and all recipients of General Assistance from City of Champaign (Illinois) Township.

In 1974 the petitioners brought an action under 42 U.S.C. §1983 against the Township and its Supervisor (respondents herein), seeking declaratory and injunctive relief from the respondents' policy and practice of administering General Assistance without having and applying written standards of eligibility and without providing adequate and written notification of their decisions, denying Due Process of Law to the petitioners. In addition, the petitioners sought retroactive monetary relief for each class member

who had in the past been qualified for benefits but had been illegally denied those benefits. Preliminary injunctive relief was sought, but denied.

In 1976, the Seventh Circuit Court of Appeals reversed the District Court's denial of preliminary relief and specifically held that Due Process of Law required the respondents to have and apply written standards of eligibility and to provide adequate written notification of their decisions. White v. Roughton, 530 F.2d 750 (7th Cir. 1976).

B. The Consent Decree and Standards

The parties then agreed to a settlement of all issues and a Consent Decree was entered by the District Court on June 8, 1976.

The Consent Decree provided the petitioners with both the declaratory and

injunctive relief being sought concerning the need for written standards and written notification of decisions.

In addition, the parties had negotiated a specific set of written standards to be used by the respondents, which were "adopted" by the respondents "pursuant to this settlement." Those negotiated standards were attached to the Consent Decree and expressly incorporated in the Consent Decree by reference in the same paragraph which permanently enjoined the respondents from failing to apply written standards. (R.App. 4)

The Consent Decree specifically stated that "...the standards shall from this day forward be substantially in compliance with the standards adopted pursuant to this settlement and attached hereto as Exhibit 2." (R.App. 4)

The Consent Decree also specifically enjoined the respondents "...from enforcing any rules or regulations...insofar as such enforcements are in conflict with the Orders of Court issued as a part of or pursuant to this Decree," and jurisdiction was retained..."to enforce and modify, if necessary, the provisions of this Decree." (R.App.4)

Specifically "in consideration" for the respondents' agreement to the provisions of the Consent Decree, "particularly the entry of a permanent injunction against" the respondents, the petitioners waived their claims for retroactive benefits. (R.App. 4)

C. The Unilateral Repeal of a Provision

The written standards negotiated by the parties and adopted by the respondents contained a provision (§2-4) requiring the

respondents to provide "emergency assistance" to petitioners "when necessary for an applicant's or recipient's health and well-being." (R.App.5)

On February 10, 1981, the respondents unilaterally repealed that "emergency assistance" provision. Neither the petitioners' consent, nor the District Court's consent, was sought or received for that modification of the Standards which had been incorporated into the Consent Decree. Appendix, p.4.

D. The Contempt Action

The respondents no longer would provide emergency assistance to those petitioners who would have been eligible for it under the terms of the negotiated Standards.

The petitioners accordingly filed contempt papers against the respondents

seeking judicial enforcement of the Consent Decree, pursuant to the Court's general contempt powers as well as the consent decree provision explicitly retaining jurisdiction to enforce the provisions of the Decree. The Motion for a Contempt Judgment was denied by the District Court. The petitioners then appealed to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. §1291.

The Court of Appeals focused on the following language from the Consent Decree:

> The standards shall from this day forward be substantially in compliance with the standards adopted pursuant to the settlement and attached hereto as Exhibit 2.

The Opinion of the Circuit Court found that the above language is not ambiguous. The Court stated:

It is quite true, as the Plain-

> tiffs argue, that the italized clause, standing alone, requires the Township to adhere, at least substantially, to the standards set forth in the Exhibit to the Decree, and that the repeal of emergency assistance is not substantial compliance. Appendix, pp.5-6.

The Circuit Court then decided that even though the language of the Decree is not ambiguous,

> ...it is permissible to construe unambiguous language where construction is necessary to determine the intended rather than the literal meaning of the Decree. Appendix, pp.9-10.

It further stated:

> ...while the language of the contract is normally the best evidence of that intent, a Court can properly disregard even unambiguous language when it is convinced that the parties meant something different from what they said. Appendix, p.10.

The Circuit Court then went on to hold that the unambiguous requirement in the Consent Decree (i.e., substantial

compliance with the negotiated Standards) was "useless surplusage" which could be disregarded by the respondents.

The basis asserted for this rejection of the unambiguous language was that the Court did "...not believe that the parties meant to include it." [2] Appendix, p.13.

The Seventh Circuit therefore concluded that the respondents did not violate the consent decree by unilaterally repeal-

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[2] No "extrinsic evidence" had been submitted by either party as to the meaning of the Consent Decree. The Court therefore relied on its "doubt" that the respondents would have been "...so inept a bargainer..." and its "doubt" that the respondents would have agreed to it "...without insisting that the decree contain a more flexible machinery for modification ..." than is traditional. No consideration was given to the intent of the other party to the consent decree (the petitioners). Appendix, pp.13-18.

ing the emergency assistance provision in the Standards.[3]

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO WHEN THE USE OF EXTRINSIC AIDS IN THE INTERPRETATION OF CONSENT DECREE LANGUAGE IS PERMISSABLE UNDER SUPREME COURT DECISIONS.

The Seventh Circuit clearly decided in its Opinion below that it is permissable for a court to resort to extrinsic aids when interpreting consent decree language in all cases, even when the language is not ambiguous:

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[3] As the Seventh Circuit had just decided in its Opinion herein that extrinsic aids could be used to interpret (and even disregard) unambiguous language, the petitioners then submitted affidavits showing that the parties in fact did intend for the unambiguous language to be taken literally; the Petition for Rehearing or Remand was denied.

> Nor do we agree with the plaintiffs that interpretation is permissible only if the language of the decree is ambiguous. Sportmart does not support that proposition. We said there that "the ambiguity of the decree's application to the present case is plain and resort to the circumstances surrounding the formation of the consent decree in order to construe its terms, if ambiguity be necessary at all before resort to such extrinsic aids, is proper." 601 F.2d at 317 (emphasis added). This formulation leaves open for another day-this day-the question whether it is permissible to construe unambiguous language where construction is necessary to determine the intended rather than the literal meaning of the decree.
>
> * * *
>
> ...while the language of the contract is normally the best evidence of that intent, a court can properly disregard even unambiguous language when it is convinced that the parties meant something different from what they said. Appendix, p.10.

That decision expressly allowing unambiguous terms to be disregarded is in

direct conflict with the decisions of the Fifth Circuit Court of Appeals; it also conflicts with the First Circuit reading of Supreme Court decisions on consent decree enforcement.

The Fifth Circuit has expressly decided that a Consent Decree must be enforced as written, unless the language is ambiguous. Strouse v. J. Kinson Cook, Inc., 634 F.2d 883, 885 (5th Cir. 1981). Other Fifth Circuit Court of Appeals decisions expressing that same view include Roberts v. St. Regis Paper Co., 653 F.2d 166, 171 (5th Cir. 1981), and Eaton v. Courtaulds of North America, Inc., 578 F.2d 87 (5th Cir. 1978). In Eaton, the Fifth Circuit Court of Appeals stated that resort to extrinsic considerations was improper because "...the language of an agreement, unless amgibuous,

represents the parties' intention." Eaton, 578 F.2d at 90.

The Fifth Circuit decisions are based on the Supreme Court decisions which hold that, for purposes of enforcement, consent decrees are to be treated as contracts, using the "four corners" rule. United States v. Armour and Co., 402 U.S. 673 (1971), United States v. Atlantic Refining Co., 360 U.S. 19 (1959), Hughes v. United States, 342 U.S. 353 (1952), and United States v. ITT Continental Baking Co., 420 U.S. 223 (1975).

Although the Fifth Circuit recognizes, as did the Seventh Circuit below, that ITT Continental allowed reliance upon certain aids to construction, the Fifth Circuit cases cited above explicitly hold that ITT Continental allows such resort to extrinsic aids only if the language is ambiguous.

Indeed, the opinion in ITT Continental itself indicates that resort to outside aids is permissible only to explain "ambiguous terms." 420 U.S. 238, fn. 11.

The First Circuit has also read ITT Continental to require ambiguity before resort to extrinsic aids is proper. Cornelius v. Hogan, 663 F.2d 330, 333 (1st Cir. 1981). See also United States v. American Society of Civil Engineering, 446 F.Supp. 808, fn. 14 (S.D.N.Y. 1977).

Thus, a direct conflict exists between the Circuits as to whether the Supreme Court decisions permit language of a consent decree to be disregarded when it is unambiguous.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE ENFORCEMENT OF CONSENT DECREES AND ALL CONTRACTS.

The decision below is a novel one. For the first time, a court has held that it is permissible to construe unambiguous language in order to determine the intended rather than the literal meaning of a consent decree.

Moreover, the opinion below does not limit this new rule to consent decrees; it speaks to all contracts:

> ...while the language of the contract is normally the best evidence of that intent, a Court can properly disregard even unambiguous language when it is convinced that the parties meant something different from what they said. Appendix, p.10.

The decision then goes one step further. It puts upon the party seeking to enforce the literal meaning of unambig-

uous terms the burden of proving through the introduction of extrinsic evidence that the parties in fact meant what they said. Appendix, p.18.

In effect, the Seventh Circuit is expanding (if not violating) the Supreme Court decision in ITT Continental, and in so doing it is ensuring that the substantial problems predicted by the dissenters in that case will come about.

The decision below will effectively require (not just permit) the production of extrinsic evidence in every action to enforce the terms of a consent decree or contract. It makes no difference that the language is unambiguous; it makes no difference that the opposing party has produced no evidence that the literal terms were not intended by the parties; the party seeking to enforce the literal

meaning of unambiguous terms has the burden of proving that the parties meant what they said, in every case; failure to produce such extrinsic evidence as to the intent of both parties is a substantial risk.

Of course, it will be extremely difficult for one party to produce evidence as to the other party's intent.

The courts will then be required to consider this extrinsic evidence in every case, making decisions as to what the parties "intended" by what they said, even though unambiguous.

Further, when neither party introduces extrinsic evidence, the opinion below allows the courts to make this interpretation upon pure speculation as to what the opposing party alone intended. There is "...no apparent limit on the

power of the judiciary to alter the plain language of an order in light of the 'circumstances surrounding the order and the context in which the parties were operating.'" ITT Continental, 420 U.S. at 249.

This new rule poses serious difficulties for the enforcement of all existing and all future consent decrees. Alleged violators will seek to narrow and thereby evade the plain meaning of unambiguous language. Those who have not violated agreements will be encouraged to do so when unsatisfied with their agreements, no matter how unambiguous, because the other party will have the burden of proving that the parties actually meant what they said.

Finally, the opinion below threatens to retard significantly the effective use of consent decrees, because of the increas-

ed difficulty and uncertainty in enforcement of settlement agreements.

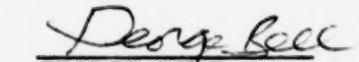
It is therefore important that the Supreme Court decision in ITT Continental be clarified. It needs to be made clear that the "four corners" rule is still valid in the enforcement of consent decrees and all other contracts. It needs to be made clear that resort to extrinsic aids is permissible only if the language is found to be ambiguous, and that it is impermissible to disregard the plain meaning of unambiguous language.

If the Seventh Circuit's expansion of ITT Continental is allowed to stand, significant and recurring problems will result in the enforcement of all consent decrees and all contracts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully
submitted,



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